No. 16090

UNITED STATES

COURT OF APPEALS

for the Ninth Circuit

IN THE MATTER OF THE BANKRUPTCY OF

VINCENT HALLS DUNCAN and ROBERTA JEANNE DUNCAN, a marital community, dba V. H. DUNCAN CO.,

Bankrupt.

ORVAL D. MARKS,

Appellant,

-vs-

J. E. PINKHAM, Trustee in Bankruptcy,
and
HON. O. M. PITZEN, Referee in Bankruptcy,

Appellees.

BRIEF OF APPELLEES

Upon Appeal from the District Court of the United States for the Western District of Washington, Southern Division
HON. GEORGE H. BOLDT, *Judge*

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CONCISE ADDITIONAL STATEMENT OF CASE:

At the inception of the transaction, the truck and trailer were leased to Pacific Truck Rental Diesel and operated by Carl Duncan until January 20, 1956, out

of Portland, Oregon, (Tr. 42, Ex. 1, Tr. 17, 19, 20) in interstate commerce between Portland, California and also Seattle, Washington (Tr. 86) and this arrangement continued from September, 1955, through to about the end of August, 1956, except for responsibility for and physical operation by Vincent Duncan after January 20, 1956 (Tr. 88, 89). After August, 1956, Vincent Duncan drove the equipment himself part of the time and trip leased to others for part of the time, but at all times when the rolling stock was in a state of rest, that is, not in use or at the end of a trip, the same was brought by him to and remained at his residence at Tacoma, Washington and were so located when bankruptcy intervened (Tr. 87).

"Q Was the truck ever brought to your home until bankruptcy time?

A Was it ever brought to my home?

Q Yes, ever been there before?

A Yes, each trip in.

Q Each trip in?

A Yes.

Q Where was it garaged?

A Well—

Q Over the trips, where was it garaged?

A It was just parked.

Q Where?

A There up in front of my home.

Q Here in Tacoma, Washington?

A Yes.

Q Has that been your habit for sometime past before bankruptcy?

A Yes, sir."

Mr. Marks knew, or should have known, for a period of approximately thirteen (13) months preceding adjudication in bankruptcy of the facts and circumstances, the location of and the nature of the business concerning the truck and trailer (Appendix A) and knowledge of such facts constituted either actual or constructive notice to him throughout that period of time (Tr. 174). The terminal point and point of origin and base of operations did not at all times remain in Portland, Oregon, but changed as indicated in the record to Tacoma, Washington, and there remained for approximately thirteen (13) months preceding adjudication. There were no restrictions upon the removal of the truck and trailer from Portland, Oregon, either express or implied (Tr. 124, Line 21). The original mortgage printed form used by the mortgagee provided for restrictions in area operations but the printed blank was left vacant by the mortgagee who prepared same (Tr. 17, Ex. 1) and no area restrictions were ever placed upon the operations of the truck by the original instrument or as far as the record shows thereafter by the mortgagee or anyone else (Tr. 124, Line 21). The nature of the business in

which the trucks were engaged was hauling produce over the western states (Tr. 124, Tr. 39 e-2). At no time did the bankrupt have any office or place of business or advertise indicating the location of his business was in Portland, Oregon, but on the contrary such facts adduced from the record are to the contrary, (Tr. 64, 65, 79, 84, 85, 146, 147, 164) namely, that Tacoma, Washington, was his only address and he was there contacted in reference to his business, other than the word-of-mouth conversations occurring in Portland when the mortgagee and mortgagor met occasionally (Tr. 100). From the very beginning of the deal to date of bankruptcy, the mortgage was always in default, (Tr. 45, 50, 51) no regular payments having been made as required by the mortgage and note in question. The mortgagee had many occasions in which to exercise his remedies (Tr. 146) over an extensive period of time preceding the bankruptcy, and he was kept fully informed by the bankrupt of all facts concerning the deal and the use of the equipment as he desired to be (Appendix A). The bankrupt at no time concealed or falsified in any way his advices to the mortgagee or concealed the assets involved (Tr. 55, 52, 100, 123).

CONTENTIONS OF APPELLEES

A "removal" in fact and in law occurred with the knowledge and consent of the mortgagee who failed to re-file or exercise diligence thereafter.

1. That by the terms of RCW 61.04.090, in fact and in law there has been a removal of the equipment requiring re-filing or diligent assertion of remedies by mortgagee.

2. That full knowledge and consent of the mortgagee coupled with non-concealment of facts by bankrupt constituted a waiver of his lien by him and Trustee's title is freed therefrom.

3. That under the facts and circumstances of this case the mortgagee failed to use that diligence required of him either to exercise his remedies or to secure the return of the truck to the locality in which it was registered and the mortgage filed, to wit, Portland, Oregon, or to re-file the mortgage in Pierce County, Washington, the residence of the sole operator of the truck.

4. That no error in the Referee's Court or the District Court occurred.

ARGUMENT

The appellee, reframing the question involved here, argues the same to be, whether or not under the facts and circumstances as disclosed by the record, the interest of the Trustee in Bankruptcy for the mortgagor-bankrupt is superior to the mortgage lien claimed by appellant. Inherent in the answer to the above inquiry is the answer to subsidiary questions, namely, was there in fact or in law a removal; secondly, was the appellant charged with actual or constructive notice thereof; and thirdly, was the appellant diligent in the assertion of his rights in the premises after removal.

A removal in fact occurred (See Appendix B). As stated by appellant, the law is quite clear that the original validity of a chattel mortgage is determined by the law of its situs; that if in fact the truck and trailer have been "removed" from Oregon to Washington, then the question of the validity of the mortgage and its priority as against the Trustee in Bankruptcy is to be determined by the Supreme Court of the State in which the bankruptcy court sits, that is, the State of Washington; that the filing acts of the State of Washington do not require re-filing in Washington of a chattel mortgage on personalty originally located and mortgaged out of the State and later brought into Washington, with the exception that where such is done with the knowledge, acquiescence or consent of the mortgagee, or where the mortgagee

fails to use diligence in the assertion of his rights re-filing is required or such lien of the mortgagee is lost.

Where counsel for the respective parties part company is on proposition number 4 argued by counsel commencing on page 10 of his brief. While appellant contends that no removal of the truck and trailer from Oregon to Washington occurred, in the cases investigated and read by appellee's counsel the Courts naturally presumed removal had occurred when the personal property was physically taken from one state to another without explanation, whether or not a legal removal or a factual one was involved or whether there is some form of legal removal which is unrelated to a factual removal. In the following cases the bare facts of physical removal from one state to another was assumed and dealt with as a removal as meant in the present case.

Bankers Finance Corp. v. Motor Co., 170 Tenn. 28, 91 SW 2d 197, 300

Applewhite v. Etheridge, 210 N.C. 433, 187 I.E. 588, 590

Vervais v. Egan, 226 Ill. App. 500, 3rd Dec. Digest 85

Flora v. Julesburg Motor Co., 69 Colo. 239, 193 P. 545

In re Nuckols, 201 F 437

57 ALR 702, 710; 13 ALR 2d 1312 ff.

Surely in the instant case there was considerably more of a removal feature involved than in those cases.

Carl Duncan was eliminated by action of both of the interested parties from any further control, possession or management of the subject matter of the chattel mortgage from and after about January 20, 1956, and the so called silent partner, Vincent Duncan, the bankrupt, then commenced the assertion of his rights, claiming ownership, admitted to be the owner by the mortgagee and exercising rights of possession, control and actual physical possession for at least thirteen (13) months preceding bankruptcy. The habit and custom of bringing the truck to his home for many months preceding bankruptcy at the termination of runs and when the truck was not rolling was an entirely different situation than when Carl Duncan originally had possession and operated and controlled the truck from and after the time of sale and date of mortgage. This is a far different situation than where a piece of rolling stock occasionally makes *transient trips* to Washington as indicated in counsel's argument or to a near-by town in another State on regular trips as mentioned in Flora v. Jewell Motor Co. found on page 11 of counsel's Brief.

The situation also varies from the rule cited on page 11 of appellant's argument, to wit, the case of Bankers' Finance v. Locke, 170 Tenn. 28, 91 Sw Sec. 297. In the Locke case the rule of law contended for again is qualified by the well known exception, "that unless the mortgagee has consented to the removal of the property into

the State, or having knowledge of this removal, had failed to assert rights under the mortgage within a reasonable time", 13 ALR 2d at page 1324.

A "removal" in law occurred. As stated in the argument of counsel for appellant, the latest and most complete expression of the Supreme Court of the State of Washington is found in the case of Isaacs v. Mack Motor Truck Corp., 50 W. 2d 325, 311 P. 2d 663. That case is authority for the holding that where the consent of the mortgagee, apparently either expressed or implied, actual or constructive, to the physical removal of the property from one State to another exists, that a refiling or compliance with the local statutes relating to filing must be had by him in order to protect and continue his lien; that where knowledge of such removal or consent thereto is absent, the out-of-state mortgage lien is protected; that where a mortgagee, after learning of the new whereabouts of the subject matter delays unreasonably to comply with the laws of the state to which the subject matter is removed or delays unreasonably in asserting his rights to the possession of the property the mortgage lien is lost as against the creditors of the mortgagor. So, on page 329 the Court resolves the rule to be:

> "Where personal property subject to a valid chattel mortgage executed in another State, is removed to this State, the lien of the mortgagee will

> be superior to that of an attaching creditor of the mortgagor in this State, for goods or services rendered without notice of the chattel mortgage, *only* if the mortgaged property is removed without the knowledge or consent of the mortgagee and he, after learning of its whereabouts, complies with our filing laws or proceeds to assert his rights under the mortgage, without unseasonable delay."

The important dates involved in the Isaacs case are as follows: Filing in Multnomah County, April 2nd, 1952; removal to Washington in the month of April, 1953; date of knowledge of removal, either June 25, 1953 or July 5, 1953; re-filing of the chattel mortgage, July 10, 1953; and commencement of foreclosure proceedings thereunder almost immediately thereafter. The distinguishing characteristics of that case consist of proof that the truck was removed from Oregon without the consent of the mortgagee and the mortgage in that case contained restrictive words which made removal without consent a breach of the mortgage in question. The period of diligence involved therefore is to be computed from the removal date in April, 1953, to July 10, 1953, a period of not to exceed ninety (90) days.

> "To 'remove' is 'to transfer especially in order to re-establish' a location, situs, or residence"
>
> Bankers Finance Corp. v. Locke, 170 Tenn 28, 91 SW 2d 297

In that case which was cited by counsel in support of

his contentions that no removal had been had, at page 300, the court stated:

> "It" (the car) "was in Lawrence County on 'a trip' merely taken by a traveller. It had never, so to speak, come to rest there."
>
> "Its headquarters, its home place, was apparently that of its driver."

Upon these holdings the court, concluding that the transitory nature of the event in that case did not constitute removal even though the foreign mortgagee had knowledge of the trip, held the mortgagee's lien rights superior and preserved.

> "The word 'removed' as used, implies not only the taking of the property into Virginia, but also the allowing of the property to come to rest therein —the gaining of a situs therein."

Applewhite v. Etheridge, 210 N.C. 433, 187 S.E. 588, 590.

In this case the North Carolinian mortgagee who had taken the car into Virginia where a Virginia law required re-filing when personalty was brought into the State in order to protect an out-of-state mortgagee, it was held that the mortgagee's lien was lost in favor of a purchaser of the car in a Virginia re-sale by the mortgagor. The facts as given in the case do not disclose however just what length of time the mortgagor had remained in Virginia whereby a "removal" was accomplished.

The case of Vervais v. Egan, 226 Ill. App. 500; 3rd Dec. Digest 85, held that a chattel mortgage of a motor truck is not valid as to third persons, notwithstanding its recordation in Illinois, where the evidence shows that the truck was used and kept outside the state, although it is described in the mortgage as located within the state, and the mortgagor is a non-resident.

The next case cited more closely approximates the facts of the instant case and should be distinguished. In Flora v. Julesburg Motor Co., 69 Colo. 239, 193 P. 545, the facts were that a mortgage given in Colorado by a Nebraska man, who lived eight or nine miles away and across the State line on a farm, for a truck, was recorded in Nebraska, the place of residence of the purchaser-mortgagor. From that point of time on the mortgagor used his truck as a farm truck in an ordinary manner, going to the nearby town across the Colorado border to dispose of his produce and to make purchases and for other ordinary purposes. On some of these occasions he apparently became indebted to a Colorado garageman who asserted his lien after searching the Colorado County records and finding no mortgage was filed. The Colorado court upheld the filing in Nebraska under these circumstances as the proper place for such recordation and as a result thereof held that these ordinary visits into the Colorado town by the farmer under these circumstances was not a removal such as to vitiate the lien of the mort-

gage. This holding was conditioned upon the fact that the sale in Colorado was for immediate removal to the State of Nebraska, the home of the purchaser, within the then knowledge of both parties, and also that it was to be used substantially all of the time in the State of Nebraska. These factors distinguish the holding in the case from that which should prevail in the instant case.

Washington law supports the contemplated immediate removal theory in North Pacific Bank v. Pacific Mer. Agency, 153 Wash 37, 279 P. 103, Tr. 39 e-6.

On page 8 of his brief, counsel cites In re Nuckols, 201 F. 437 and 57 ALR 702, 710; 13 ALR 2d 1312 ff: In this case, as in the preceding case, it was held that the law of the state where the property was situated at the time and constinuously thereafter until the cause of action arose governs where the mortgagor was domiciled and the mortgage was executed in a foreign State. Here the mortgage was recorded in the State where the property (railroad building equipment) was located at the time of execution and again no removal questions are involved in this case.

On page 8 of appellant's brief is found reference to the case of In re Greene, 134 F. 137. This case is distinguishable on the facts from the present case and therefore the ruling there obtained is not authority for the ruling which should prevail here. Hotel furniture, never

moved was there involved. The physical location of and filing was had in the proper county in Connecticut. Both parties to the mortgage resided in and executed the mortgage in the State of New York. There was no recording in the State of New York. The cause of action arose in Connecticut. The Court there stated:

> "The recordation required by the statute was to preserve the lien as against third party, and the real question is one of priority between lien holders, which must be decided by the law of the place where the property lies and where the court sits which decides the case."

Appellee agrees that the State of Washington Supreme Court's decision in the Isaacs case must govern in this particular case. Here the mortgage was not recorded in the State of removal and where the action arises, to wit, Washington, the property there was not rolling equipment but was more or less immovable in the hotel and therefore undoubtedly had its situs there. Both parties lived out of the State where the mortgage was recorded and the property located, while here we have a diversity of residence of the parties. There was no question of the removal of the property subsequently from one state to another there involved, the same remaining at all times in Connecticut.

In the case of Globe, Greene & Mill Co. vs. DeTweede, Northwestern and T. Hypotheekbank, (1934, C A 9th,

Idaho) 69 F 2d 418, an Idaho statute almost identical in wording and effect as that of the State of Washington was applied in the manner that rule had been interpreted by the Idaho Supreme Court. It was there held that these conflicting rights between parties such as the parties to this appeal will be determined by the principles of comity as applied by the Supreme Court of the state of removal. There the court held that the removal occurring with the knowledge of the mortgagee should be deemed a waiver of the mortgagee's lien upon the principle that where one of two persons will suffer by reason of the wrongful acts of the third person, the injury must be borne by him by whose conduct the wrongful act has been made possible.

From the above holdings it will be seen that the courts are not inclined to be so arbitrary in their holdings as to require, as counsel stated, "it would be necessary in every instance to record the chattel mortgage in every state of the union and in all of the territories and possessions.", (Brief 12), where one merely takes trips into other states in a vehicle without passage of time or the establishment of a situs in the state of removal in order that the mortgagee's lien may be protected therein and such is not the argument of appellee. It is to be presumed that the courts in the future will continue to distinguish between transitory trips and removal involving elements of permanency.

> "Whether the policy of this law is good or bad is not for us to say. The matter of the wisdom or good policy of a legislative act is a matter for the legislature to determine. The courts are required to give effect to the legislative acts if it does not violate the constitution." (13 ALR 2d 1311)
>
> "In this case there is no question of violation of any constitutional provision but only the withdrawing of property rights which would otherwise exist."

Lee v. Bank of Georgia, 159 Fla. 481, 32 So 2d 7, 13 ALR 2d 1306.

On page 11 of appellant's brief, the contention is made that "removal" indicates a permanent rather than a transitory change. Again the factual situation found in the transcript as determined by the trier of the facts, the Referee in Bankruptcy, and supported by the Memorandum Decision and Order of the District Court, are determinative. If this Court should believe from the facts and circumstances that the equipment here in question was only temporarily brought into the State for transient use, then the rules of law contended for by counsel may be correct. However, the facts and circumstances support a contrary conclusion, namely, that the location of the equipment in the State of Washington was not temporary or transient in nature, but rather as permanent as "permanency" is commonly understood. In fact, it is difficult to determine what additional factors could have been proven to show permanency. It is con-

tended that if a "removal" is found to have existed here, then "Every State has the right to regulate the transfer of property within its limits", Harvey v. R.I. Locomotive Works, 93 U.S. 664,667, 23 L. ed. 1003. The recording acts applies to chattels generally, not merely to automobiles, and accordingly a construction peculiarly applicable to motor vehicles is not appropriate, Fagle v. General Credit, 122 F 2d 45, 136 ALR 814.

One provision of RCW 61.04.090, namely, that the chattel mortgage could be re-filed upon removal in the nearest custom office is persuasive that the legislators intended the law to cover property brought into the state from abroad.

In the first paragraph of page 13 of appellant's brief it is pointed out that RCW, Title 46, relates to registration and certificates of ownership, RCW 46.16 relates to licensing and in the latter law there is no non-resident requirement in order to secure the permit obtainable. The Director of Licenses is allowed to issue the permit if he so desires under the facts and circumstances. Thus, in this case, even though the bankrupt could have obtained a certificate of ownership and registration under RCW 46.12, he was not required to do so under the latter law relating to licenses and permits and if the Director of Licenses saw fit to issue a permit then he must have been satisfied that the Oregon registration under reciprocal statutes should continue to be honored.

In the State of Washington as well as in the State of Oregon, the registration of motor vehicle requirements have not yet supplanted the requirements of the filing laws. A discussion of the Washington law on this subject is found at 15 Wash. Law Review 182, and this argument of counsel is properly directed to the proper state registration or licensing department for determination as to whether or not a permit only would be issued to Vincent Duncan under these circumstances or whether such department would require re-registration and the re-issuance of Washington State licenses as a prerequisite to operation. It is conceivable that it was physically easier to secure a permit and continue with the registrations already obtained from the State of Oregon or that it was less costly for the operator so to do.

In any event, the argument based upon these laws of Washington are inappropriately addressed to this court since the controversy lies between two private parties claiming adverse interests in the equipment itself. It should be addressed to the registering and licensing authorities of the state of residence of the owner since they are the officials charged with collecting the fees permitted by such laws.

The appellant had every opportunity to know of and did have knowledge of the facts, including the "removal" factor. (Appendix A)

Appellant's testimony was that the mortgagee had *full knowledge* of the location and nature of operation of the truck in question for more than thirteen (13) months preceding the bankruptcy and there was no *concealment* by the bankrupt of any facts inquired into by him. Tr. 44, line 10 to Tr. 45, line 8.

Conversations had between Mr. Vincent Duncan and the mortgagee on the *occasional* trips to Portland that Vincent Duncan made are explained in Tr. 100 by Mr. Marks. The signing of titles and re-issuing of same is shown especially on Tr. 105 by Mr. Marks. Conversations with Vincent Duncan and his wife are indicated on Tr. 108 by Mr. Marks, at which times they would talk over their business. In Tr. 110 Mr. Marks indicated in his answer that he knew when the Pacific Truck Rentals Co. was leasing the truck because its name was on the papers and he knew when it was not leasing because it was signed off the papers, in which transactions he was obliged to take a part and of which papers he had copies or originals of in his possession at all times. This testimony continues for a page or two along those lines terminating at Tr. 111. Mr. Mark's disconnection with Carl Duncan after January of 1956 is shown by his answers found at Tr. 118, lines 1 to 5.

Mr. Mark's lack of inquiry is indicated at Tr. 122, lines 18 to 22. There he was asked:

"Q And never made any inquiry?

A No.

Q You didn't know where the equipment was, or what it was doing?

A No."

On the question that *a removal in fact occurred*, on Tr. 122, line 24 to Tr. 123 line 4, we find:

"Q Did you have any signed agreement with either Vincent after January of '56 or both of the boys before January '56 concerning the location of their operation?

A All I know is the operation was in Portland.

Q Well, what operation was in Portland?

A Pacific Truck Rental."

As to Mr. Marks' knowledge of the location of the operation, Tr. 123, line 5 to line 17 clearly indicates that he dealt with Vincent Duncan only out of Tacoma in connection with his business affairs or occasionally saw Vincent Duncan in Portland intermittently. On Tr. 124, line 21, in answer to the question

"Q Now, was there anything outside the written chattel mortgage, was there any other arrangement orally or otherwise, between you and either Carl and Vincent in the first instance or Vincent in the second instance preventing them from terminating their lease with the business firm in Portland,

Oregon and taking the property to the State of Washington?

A There was no basis there."

In reference to the testimony of the bankrupt, Vincent Duncan, Tr. 79, line 3 to line 14 shows definitely the residence and place of business and operation of Vincent Duncan at all times. First Carl Duncan was admittedly a resident of Portland, Oregon, until he left the picture in January of 1956, but from that point on the only person connected with this operation was Vincent Duncan and his residence and place of business was definitely Tacoma, Pierce County, Washington from that time on. In Tr. 84 and 85 is found a description of the way Vincent Duncan operated his business with the location and address thereof at all times and his residence in Tacoma, Pierce County, Washington.

On the question of *permanency of removal,* Tr. 87, lines 10 to 24, clearly indicates that the truck, after each trip in, was taken by Vincent to his home and parked there and that such event had happened for a long time before bankruptcy intervened, in fact, since about May, 1956, Tr. 88, line 2 shows Vincent Duncan had the actual physical possession of the truck from May, 1956 and thereafter. The question was asked of appellant

"Q There had never been any concealment that Carl lived in Portland at that time and Vin-

cent lived in Tacoma throughout this period of time?

A No.

Q Had you ever claimed that Vincent ever lived in Portland or had any other residence than Tacoma, Washington throughout this transaction?

A No.

Q And do you claim or assert that there was any concealment of his residence here in the State of Washington in Tacoma at any time during this sale and chattel mortgage?

A No." (Tr. 55, line 26 to Tr. 56, line 17)

The method of payment by printed check from Vincent Duncan to Mr. Marks after the removal of Carl Duncan from the business venture was known, (Tr. 58, Ex. 3, Tr. 22). On Tr. 59, the question was asked:

"Q Now have you ever in your dealings with Vincent Duncan, leaving Carl out of the picture, seen anything other in the way of a business designation on printed stationery, envelopes or statements?"

And the answer elicited eventually on page 60, was that this printed check, (Tr. 22, Ex. 3) was the only printed matter that he ever saw concerning the firm or Vincent Duncan's operations as a sole trader, except for the name "Duncan" on the side of the truck.

Neither of the Duncans at any time had any established headquarters in Portland, Oregon, (Tr. 64, line

2 to line 23, Tr. 65, line 15 to line 23; Tr. 76, line 2 to Tr. 78, line 9).

Mr. Marks was informed that a partnership existed between the Duncan cousins in the original instance of purchase and mortgage as stated in Tr. 98, line 7 to 10. In either November or December of 1955 Orval Marks forwarded a registered letter both to Vincent Duncan in Tacoma and Carl Duncan in Portland threatening re-possession of the vehicle unless payment was made. (Tr. 146, lines 11 to 15 and lines 22 to 27, Tr. 147 lines 1 and 2.) Tr. 158 shows that after January 1, 1956 all business transactions and payments were made by Vincent Duncan and that Carl Duncan had disappeared from the scene and was not thereafter concerned with the operation in any way, (Tr. 15, lines 1 to 9). The change in the nature of the operation after the cancellation of the Pacific Truck Rentals lease in August of 1956 is explained in the testimony of Vincent Duncan in Tr. 159, lines 9 to 11. In discussing the contacts between Vincent Duncan and Mr. Marks, (Tr. 164, line 12) on cross-examination, the question was asked:

> "Q Are you certain whether it was by phone or personally?
>
> A No. I am not, *due to the fact that I talked to Orval many, many times both ways,* and I am trying to recall exactly and I can't be honest and say I do."

Tr. 165 contains this quotation.

> "Q Except for Carl being out of it, the deal is still the same old deal?
>
> A The money was the same and the payments were the same, but it was a new deal."

Mr. Marks' knowledge of the serious financial condition of Vincent Duncan from May to August of 1956 is shown in his questions and answers concerning the same, commencing on Tr. 119 and continuing to Tr. 120, line 12.

Concerning the question of *diligence* in asserting his remedies Mr. Marks testified that he did not protest or investigate to see where the truck was operating after July, 1956, (Tr. 121, line 22 to line 24). In Tr. 122, line 18 two questions and answers appear showing lack of diligence, to-wit:

> "Q And never made any inquiry?
>
> A No.
>
> Q You didn't know where the equipment was, or what it was doing?
>
> A No."

The appellant was not diligent. The Court's attention is called to the following case which so indicates.

In Robbins vs. Bostian (1943, C A 8th Mo.), 138 F 2d 622, involving a trustee in bankruptcy, the court stated:

> "Vendor's knowledge of the situs of this property in Nebraska and his acquiescence for a period

> of five months in that removal, was tantamount, we think, to a consent to the removal."

and:

> "Where the mortgagee under an Indiana mortgage knew for approximately one year before the attachment of the property in Tennessee by the creditors of the mortgagor that the mortgaged property was in Tennessee, and that the mortgagor was financially embarrassed, but took no steps to assert his claim against the property until after it was impounded by the attachment in Tennessee, it was held in Great American Indem. Co. vs. Utility Contractors (1937) 21 Tenn. App. 463, 111 SW 2d 901, that the chancellor did not err in decreeing that the attachment was superior to the mortgagee's lien."

Therefore, it is seen that this is a factual question only, the rules of law being agreed upon. Was the mortgagee, during the period of twenty (20) months intervening between the re-arrangements made with Vincent Duncan only by the mortgagee or the period of thirteen (13) months intervening between the cancellation of the Pacific Truck Rentals lease, until bankruptcy intervened, during which times the chattel mortgage in question was at all times in default to some extent, during which times the mortgagee was informed upon all the facts he desired to be informed and had actual contacts throughout the period with the mortgagor for the purpose of obtaining further information if he so desired, diligent or negligent in failing to assert his rights and/or secure the return of the truck to the locality where the

filing occurred, to wit, Multnomah County, Oregon, and/or to re-file as required by the Washington statutes?

If the answer to that inquiry is that such period of time of inaction on the part of the mortgagee denotes diligence then of course, the lien of the mortgage will survive and be assertable against the Trustee in Bankruptcy, otherwise the answer must be to the contrary. In the record there is ample evidence that the Trustee's superior position was correctly adjudicated by the District Court. This matter was submitted on written legal briefs by the appellant and the attorney for the Trustee, which briefs were before the Referee at the time of his Decision and Order (Tr. 39 b, c and d). No new argument or further points of law were submitted to the District Court, he, too, having the benefit of the written legal briefs and the Memorandum Opinion of the Referee (Tr. 39e), before him. There are no new legal points raised in the argument before this court which have not been considered and ruled upon after consideration was given to the authorities cited in the same available original briefs.

CONCLUSION

In answer to the conclusions stated in the brief of appellant, appellee contends that RCW 61.04.090 is a statute that applies only to conditions which change after the original transaction between the parties has been completed; that its terms as decided in the Isaacs case apply to the present situation from and after such time as the court determines that a removal has occurred. From that point on the terms of the re-filing statute applies as an exception to the general rule where absence of knowledge, absence of a removal and presence of diligence are involved. It was not necessary originally to record the mortgage in Washington the very moment the mortgage was executed because of the fact that Vincent Duncan then and thereafter continued to be domiciled and resident of Tacoma, Washington, but when the facts and circumstances changed concerning the operation, location and other surrounding factors, then and from that time on the terms and requirements of RCW 61.04.090 commenced to apply and in this case, of course, appellee argues that such period commenced at least thirteen (13) months prior to date of adjudication. Such conclusion is not contrary to the cases cited by appellant herein as indicated by excerpts from the same cases by appellee. The filing requirements are to be determined by the laws of Oregon where the deal was made and the equipment located only as a general rule

and not as an exception to the general rule, as indicated in the Isaacs case.

As stated by counsel, actually, the case is quite simple. The truck and trailer were in September, 1955 located in Oregon; the deal was made in Oregon and the mortgage recorded in Oregon; the title and licenses were issued in Oregon and the equipment continued to carry Oregon licenses and titles and a Washington permit. The truck was used in interstate commerce in Oregon, Washington, California and other Western States and there was no distinction between its operation in and out of Washington and in and out of other states originally, but after the changed circumstances of the parties occurred by the dropping of Carl Duncan and the assumption of the physical possession of equipment by Vincent Duncan, the equipment was in Washington very frequently and as permanently as the nature of the case permitted and was parked by the mortgagor at his home at the end of each run when not in use. The trips into Washington were not occasional or transient, but were of a permanent nature as far as permanency could be injected into this controversy due to the nature of the case. The bankrupt resided in Washington at all times here involved. The mortgagee knew, or should have known about the truck and expressly or impliedly consented to its removal and failed to act in asserting his remedy until notified of the bankruptcy some thir-

teen (13) months after the change of circumstances had occurred. The bankrupt was not only then delinquent in a large amount on the mortgage but had been delinquent in all payments at all times during the continuance of the mortgage obligation.

Reference is made to page 15 of appellant's brief and the argument made in connection with the "partnership agreement" (Tr. 36). Since as stated by counsel "no final partnership agreement was ever signed" (Tr. 147) and the appellant never released Carl Duncan from liability on the joint note and mortgage, it becomes unimportant to consider what may have resulted had a partnership agreement actually been entered into as opposed to the absence of such partnership agreement. In the absence of a partnership agreement, the record shows a joint obligation originally with a signing off as far as was possible by the joint obligee in favor of the remaining obligee and that a two party relationship continued from January 20, 1956 to date of bankruptcy; that Vincent Duncan's name was the sole name on the title as mortgagor thereof. The record is amply punctuated with Vincent Duncan's assertions that he operated and claimed to own the truck continuously to and including his adjudication in bankruptcy. There was no subsequent claim to ownership, title or interest by Carl Duncan.

It may well be that in a proper case the Courts should hold that when A (resident) received a mortgage from B (non-resident) and C (resident) on movable equipment contemplated to be used by either B at his residence or C at his residence, or by either or both elsewhere, that A must at once file his mortgage in both states of residence of B and C in order to preserve his lien against an attaching creditor of either B or C.

It is clear from the record that there has been a removal as meant by the terms of RCW 61.04.090; that it was accomplished with the knowledge, expressed or implied, of the mortgagee; that the mortgagee did not act promptly, or at all, to protect his rights under his delinquent mortgage upon acquiring knowledge of the change of circumstances and the removal until after the adjudication of Vincent Duncan; that the trier of the facts having before him the witnesses and an opportunity to observe their demeanor in testifying was in the best position to place the proper weight to be given to their testimony upon the various factors involved and the District Judge being bound by the decisions of the Supreme Court of Washington felt obligated to sustain the Referee due to the holding of the Isaacs case, which held that under the facts and circumstances of this case re-filing in Washington was a requirement or diligent exercise of remedies must be had in order to protect the lien of the mortgagee. Therefore the trial

court did not err in sustaining the Referee's denial of appellant's Petition for Reclamation and this court should now affirm the decision of the District Judge.

Respectfully submitted,

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Attorney for Appellee

APPENDIX A

KNOWLEDGE OF MORTGAGEE AND NON-CONCEALMENT BY BANKRUPT

Testimony of Appellant:

Tr. 44 Line 10 to Tr. 45, Line 8
(proposed method of operation)

Tr. 47 Line 11 to 17
(record of payments received)

Tr. 48 Lines 20 to 24
(no Washington registration by Duncan)

Tr. 49 Lines 15 to 17
(mortgage not re-filed in Washington)

Tr. 52 Line 11 to Tr. 53, Line 16
(general knowledge of business of Duncan)

Tr. 55 Lines 26 to 56, Line 17
(no concealment of residence)

Tr. 58
(Tacoma checks received)

Tr. 59
(No advertising except check and sign on truck)

Tr. 60
(general nature of Duncan business)

Tr. 22, Ex. 3
(printed checks—Tacoma Bank)

Tr. 64 Line 2 to 23
(no Duncan headquarters in Portland)

Tr. 65 Line 15 to 23
(no Duncan headquarters in Portland)

Tr. 76 Line 2 to 78, Line 9
(Insurance matters)

Tr. 100
(occasional conversations in Portland)

Tr. 105
(Titles signed off—changed in his possession)

Tr. 108
(business talks with Vincent Duncan and wife)
Tr. 110 to 111
(knew of lease—on and off papers)
Tr. 118 Line 1 to 5
(no further connection with Carl after January, 1956)
Tr. 122 Line 24 to Tr. 123, Line 4
(lease to Pacific Truck Rentals)
Tr. 123, Lines 5 to 17
(dealt with Duncan at Tacoma)
Tr. 123, Line 21; also
Tr. 121, Lines 3 to 9
(no agreement re removal or lease termination)

Testimony of Vincent Duncan:

Tr. 79 Lines 3 to 14
(residence, place of business and nature of operation)
Tr. 84-85
(Tacoma location)
Tr. 87 Lines 10 to 24
(after each trip truck taken home and parked)
Tr. 88, Line 3
(after each trip truck taken home and parked)
Tr. 89 Lines 1 to 7
(Vincent had physical possession from May 1, 1956)
Tr. 159 Lines 9 to 11
(free lanced after August, 1956)
Tr. 164, Line 12
(many telephone and oral conversations)
Tr. 146 Lines 11 to 15 and Lines 22 to 27
(Registered letter concerning repossession)
Tr. 147 Lines 1 and 2
(after January 1956 all checks and transactions were with Vincent alone)

APPENDIX B

REMOVAL

Tr. 122, Line 18
("Q And never made any inquiry?")

Tr. 87, Lines 10 to 24
(equipment taken home after each trip and when at rest after May, 1956)

Tr. 88, Line 3
(Vincent Duncan had actual physical possession after May, 1956)

Tr. 100
(Duncan seen on his *occasional* trips to Portland)

Tr. 106-107
(cancellation of lease—no evidence of any new subsequent leases made)

Tr. 122, Line 24 to Tr. 123, Line 4
("Q Did you have any signed agreement with either Vincent after January of '56 or both of the boys before January of '56 concerning the location of their operation?
A All I know is the operation was in Portland.
Q Well, what operation was in Portland?
A Pacific Truck Rental.")

Tr. 123, Lines 5 to 17
(dealings with Duncan at Tacoma)

Tr. 124, Lines 21 to 28
("Q Now, was there anything outside of the written chattel mortgage, was there any other arrangement orally or otherwise between you and either Carl and Vincent in the first instance or Vincent in the second instance preventing them from terminating their lease with the business firm in Portland, Oregon, and taking the property to the State of Washintgon?
A There was no basis there.")